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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 452nd MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 18 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 2.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 10 (continued)

1. Ms. KOSKELO (Observer for Finland), referring to article 10(1), said that if the receiving bank did not execute the payment order on the day of its receipt, it would not matter because deemed acceptance would not take place until the end of day two, and therefore the bank would not incur any harmful consequences for failure to observe the same-day rule. The rule set forth in article 10(1) should not cause the Commission any difficulty, because if there was no deemed acceptance until the end of day two, then in effect the same-day rule merely had the character of a recommendation. Since at the previous meeting (A/CN.9/SR.451, para. 43) the Commission had decided in principle to allow an extra day for deemed acceptance, she failed to see why there should be any argument about the same-day rule.

2. Mr. SCHNEIDER (Germany) said his delegation believed that the Model Law should provide for an extra day as a general rule, in particular to cater for the problems of small banks and regional banks. Banks which wished to follow the same-day rule could incorporate it into their individual contracts. The United Kingdom delegation had said at the previous meeting that a recommendation by the Commission of the European Communities had no legal force. His own delegation was not convinced by that argument and thought that the Commission of the European Communities expected its recommendations to be followed; if they were not, it would convert the recommendation into a directive.

3. Mr. CRAWFORD (Canada) said that in his delegation's opinion the important principle was same-day execution. It believed that those delegations which found difficulty with that principle should be content to rely on the opportunity to secure additional execution time which their banks were afforded by the power to set cut-off times under article 10(4). However, it was essential to ensure that banks could not secure an additional day through an amended article 10 and yet another by setting a self-serving cut-off time. In his opinion, therefore, it would be necessary to re-examine the cut-off time provision in order to restrict that freedom somewhat, but that might be difficult to do because banks which adhered to the same-day execution rule as a norm for their market had to be kept in mind as well.

4. Mr. KOMAROV (Union of Soviet Socialist Republics) said that his delegation approved article 10(1) as drafted by the Working Group. The provision seemed perfectly reasonable and consistent with the general principle of freedom of contract. His delegation understood the concern expressed by a number of delegations about an additional day for the execution of orders and was prepared to consider any compromise proposal on that subject.

5. Mr. BHALA (United States of America) said that at the previous meeting (A/CN.9/SR.451, para. 66) the United Kingdom representative had indicated that

(Mr. Bhala, United States of America)

the real reason for upholding the same-day execution principle was that a "float" of funds could easily build up in the banking system if it was not adhered to. That referred, of course, to the situation in which the receiving bank would have the use of the sender's funds for a day and could invest them overnight.

6. Another point was the so-called "multiplier effect" produced by a system under which the originator sent a payment order to his bank on day one and execution occurred on day two; the bank then sent its payment order to an intermediary bank on day two and that bank executed the order on day three. His delegation favoured the same-day rule, not because his country had a sophisticated electronic banking system but because it was trying to accommodate the broadest possible types of payment order methods and take into account the interests of the originator and the beneficiary. In his delegation's opinion, a balance could be struck between those interests and the other interests traditionally raised in the Commission through the use of the cut-off time provided for in article 10(4).

7. Mr. BURMAN (United States of America) said that what was at stake was whether Governments would do their utmost to promote the flow of world trade. In his delegation's opinion, that could best be accomplished through the embodiment in the Model Law of the cut-off time principle, so as to encourage all banks to enhance their methodology in order to have access to new higher-volume systems of funds transfer. It was important to establish a standard that would best strike a balance between the interests of all concerned.

8. Mr. DE BOER (Netherlands) said that a compromise could perhaps be found by retaining the same-day rule but providing an exception whereby a receiving bank could set another time for executing a payment order.

9. The CHAIRMAN suggested that the matter might be dealt with in a footnote.

10. Mr. SCHNEIDER (Germany) said his delegation would find that solution unacceptable. A problem which arose in connection with a mandatory same-day rule was the need for the originator's bank to determine the appropriate routing by which to transmit the payment order to the beneficiary's bank. That problem did not arise for large banks but was a serious one for small and medium-sized banks.

11. Mr. HEINRICH (Bank for International Settlements) wished to convey to the Commission the concern felt by the representatives of a central bank that the same-day execution rule might be unrealistic for paper-based payment orders for small amounts. The Working Group had decided at its eighteenth session (A/CN.9/318, para. 17) that the Model Law should not differentiate between paper-based and electronic-based funds transfers, but he would like to press for a distinction to be made between them and suggested that article 10 might be the best place to do that.

12. The CHAIRMAN assured the observer for the Bank for International Settlements that his comments would be duly noted. It was true that practical

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problems would arise with paper-based transfers, but it was debatable how far that consideration should weigh with the Commission. As far as originators and beneficiaries were concerned, it was clear that the faster the service was the better. He wished to know what support there would be for saying that if the same-day rule could not function at all in practical terms, it would be better to agree on a two-day rule. Where practical difficulties were the major obstacle, it ought to be possible to leave the matter to agreement between the parties.

13. Mr. KAKOLECKI (Observer for Poland) advocated a more flexible solution than the same-day rule. He fully endorsed the views of the representative of Germany, which he knew to be shared by a number of delegations for whom a mandatory same-day rule would not pass the test of feasibility. He was in no doubt, moreover, that it would reduce the chances of future acceptance of the Model Law.

14. Mr. LE GUEN (France) said he had a number of comments on the afternoon's discussion. The first related to the Chairman's suggestion to deal by means of a footnote with the problem which the German delegation faced with the mandatory same-day execution rule. The same problem confronted his own delegation. If, as had been said, a recommendation of the Commission of the European Communities had no legal status, it must surely be admitted that UNCITRAL's Model Law would have even less. It would follow that a footnote to a Model Law which itself had little legal standing was scarcely an effective way of solving drafting problems.

15. The second point on which he wished to comment was that of the "float". He doubted if that was really the essence of the time problem, because the Model Law did not aim to regulate the terms on which banks charged their customers interest. There had been a lengthy discussion in the Working Group on various aspects of the notion of value date and it had been found that widely varying practices existed in that regard. In France there was no uniform law on value date, each bank, including the central bank, being free to adopt whatever date it wished.

16. Thirdly, in reply to the Chairman's question as to the possiblity of agreeing to a two-day rule, if the same-day rule could not function in practice, the problem might perhaps be approached from a different angle. He proposed combining the two ideas - the principle of same-day execution and the need for an extra day - in a rule which would state the primary principle of same-day execution and couple it with a proviso that, failing same-day execution, execution might at the latest take place on the following day. Whatever form of words was chosen to express that rule, article 3 should apply to it. That would leave a bank free, should it so wish, to incorporate in its contract provisions arrangements to execute orders within, say, a quarter of an hour or two hours of reception. The rule would do nothing to prevent systems from operating almost instantaneously, while allowing flexibility for certain kinds of transfer to take place on terms to be settled by the banks themselves.

17. The CHAIRMAN said he found the proposal of the representative of France very encouraging. By allowing an extra day for execution it would accommodate those transfers which for operational reasons could not be conducted on the same day, but at the same time it would enshrine the principle of same-day execution.

18. Mr. NEWMAN (United States of America) disagreed with the implication in the comments made by the representative of France that value dates were treated differently by different banks. He pointed out that France was one of the largest participants in the Society for Worldwide Interbank Financial Telecommunications (SWIFT), in which an accepted practice was the fixed value date. He could endorse the French proposal if the suggested rule was formulated in such a way as to include the words "with value backdated to original day", or wording to that effect.

19. The CHAIRMAN drew attention to the relevance of the French proposal to article 13, which would allow automatic clearance in case of refund by means of an adjustment of the credit date, i.e. the value date.

20. Mr. NEWMAN (United States of America) said that banks would always try to process payment orders as quickly as possible, given enough competition.

21. With regard to the Chairman's reference to article 13, he was of the opinion that the matters covered by that article and the French proposal were quite distinct. A forward payment based on the instructions of the originator and the originating bank was a payment which went forward to be paid on a certain date. The duty to refund was another matter altogether.

22. The CHAIRMAN replied that article 13 dealt with transactions which were not completed. In paragraph 15 of the Secretariat's commentary to article 13 (A/CN.9/346, p. 73) various measures were contemplated whereby interest could be adjusted by date shifts one day forward or one day back.

23. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) supported the French proposal.

24. Ms. KOSKELO (Observer for Finland) fully agreed that the Model Law should allow sufficient time for the execution of payment orders, but not if that meant creating a "float" in the banking system. She therefore approved the rider to the French proposal suggested by the United States. It was also desirable to deny the receiving bank any opportunity of misusing the possibility of deemed acceptance in order to create a "float". She strongly maintained that the issues of who should get the additional day's interest and how to eliminate the "float" were equally important.

25. The CHAIRMAN said that if the French representative accepted the United States suggestion, the result would be a provision expressing the same-day rule in principle while permitting a cut-off point at the end of the following day, with a rider that where execution took place on the following day, the credit should be backdated to the first day.

26. Mr. LE GUEN (France) said that the United States representative had alluded to the practice whereby banks applied previous-day value dates to payment orders executed on the day after they had received them. That was a perfectly reasonable practice, but it should not be catered for in the draft because it was not for the Model Law to regulate the terms on which banks should pay interest; such points were a matter of contract and lay in the field of banking competition.

27. The CHAIRMAN observed that article 16 dealt with allocation of the time value of funds and that interest was an important element in that.

28. Mr. SCHNEIDER (Germany) said that interest would not normally be payable unless the receiving bank had not fulfilled its obligation. There was a danger that small- and medium-scale banks would go out of business if they were required to complete execution on the day of receipt.

29. Mr. VASSEUR (Banking Federation of the European Community) said that he was in favour of the French proposal and hoped that the two-day rule would be incorporated in the Model Law. He felt, however, that banks themselves were best left to determine the practicable time-limits for execution. At the same time, article 10 should explicitly provide for the possibility of agreements which did not correspond to the general rule. There was thus a need to reconcile the wording of articles 6 and 10.

30. Mr. GREGORY (United Kingdom) said that he could accept the French proposal with the rider called for by the United States.

31. The CHAIRMAN said that, in view of the need to ensure genuine competition between banks, execution on the second day should be an exception. Unless he heard any objection, he would take it that the Commission agreed in principle to include in article 10 a rule worded along the lines proposed by the representative of France and including a rider of the kind proposed by the representative of the United States. He suggested that an ad hoc drafting group consisting of the delegations of France, Germany, the United Kingdom and the United States be asked to propose a suitable provision.

32. It was so agreed.

33. The CHAIRMAN said that, unless he heard an objection, he would take it that the square brackets enclosing the word "execute" should be deleted from the title and paragraphs 1 and 4 of article 10 and that those portions of the text should be referred to the Drafting Group.

34. It was so decided.

35. The CHAIRMAN recalled that the Commission had deleted from the draft a definition of the term "payment date", which had constituted article 2(m), on the understanding that article 10(1)(b) should be revised accordingly. He therefore suggested that the Commission might wish to approve the following text of article 10(1)(b) for referral to the Drafting Group: "the order specifies a date when the funds are to be placed at the disposal of the beneficiary and that date indicates that later execution is appropriate in

(The Chairman)

order for the beneficiary's bank to accept a payment order and execute it on that date".

36. It was so decided.

Article 6 (continued)

37. The CHAIRMAN invited comments on article 6(2)(b), (c) and (d), by which he meant the provisions so lettered in the Working Group's draft (A/CN.9/344, annex) and not what would result from the rearrangement of article 6(2) decided on at the previous meeting (A/CN.9/SR.451, para. 46).

38. Ms. KOSKELO (Observer for Finland) said that in its written comments on the draft (A/CN.9/347, p. 20), her Government had proposed an additional provision to the effect that acceptance of the payment order should be regarded as taking place if and when the receiving bank debited the sender's account with the receiving bank in order to meet the payment order. Her delegation believed that the act of the receiving bank in debiting the sender's account should constitute acceptance.

39. Mr. BHALA (United States of America) said that, according to article 5(a), one of the ways in which payment of the sender's obligation took place was by the receiving bank debiting the account of the sender with the receiving bank. Since the Finnish proposal would make that action constitute acceptance, in fact deemed acceptance, he could not agree to it.

40. Mr. LE GUEN (France) supported the view expressed by the United States representative. Accepting the Finnish proposal might introduce into the Model Law the idea that banks could debit an account without executing the payment order at the same time, thus opening the door to doubtful banking practice.

41. Mr. DE BOER (Netherlands) pointed out that sub-subparagraph (i) of article 6(2)(a) (in the original arrangement) read: "... where payment is to be made by debiting an account of the sender with the receiving bank, acceptance shall not occur until there are funds available in the account to be debited sufficient to cover the amount of the payment order". Thus when sufficient funds were available the deemed acceptance could take place in one or two days. However, he considered that the act of the receiving bank in debiting the account could reasonably imply acceptance.

42. Mr. CRAWFORD (Canada) thought that the provision in question was correct as it stood in mentioning article 5(b) and (c) and in not alluding to article 5(a). Reference to the latter would conflict with sub-subparagraph (i). Article 5(a) dealt with the stage at which payment was made to a receiving bank by the bank debiting an account, but sub-subparagraph (i) could mean that deemed acceptance took place before the debit was actually made if there were funds available to meet the order.

43. Ms. KOSKELO (Observer for Finland) said that the problem was how to deal with the situation when the bank did in fact make a debit to the account. The

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purpose of her Government's proposal - contrary to the French representative's suggestion - was to ensure that if the account was debited, acceptance of the payment order took place at the same time and the bank became bound to execute it. The proposal was designed to avoid the possibility that the bank would debit the account and not be deemed to have accepted the payment order at the same time. She did not think her proposal would give rise to questionable banking practice.

44. Mr. CRAWFORD (Canada) said that he had not understood that the Finnish suggestion was for an addition to article 6(2) rather than a substitution. He could therefore support it.

45. Mr. GREGORY (United Kingdom) was not opposed to the suggested addition; it was tantamount to saying that a bank that had paid itself should be treated as having accepted the order and must execute it. That did not, he thought, conflict with the rules about time of payment or deemed acceptance.

46. Mr. ABASCAL ZAMORA (Mexico) said that he had no difficulty in accepting the Finnish proposal.

47. Mr. BHALA (United States of America) said that the explanation of the observer for Finland had convinced him that her Government's proposal was unnecessary. There was already a deemed acceptance rule in articles 6(2)(a) (in the original arrangement) and 8(1)(a). He was concerned about changing the rule on deemed acceptance into a provision on when acceptance occurred and was unclear as to why such a provision was necessary.

48. Ms. KOSKELO (Finland) explained that at the previous meeting (A/CN.9/SR.451, para. 43) the Commission had adopted a proposal to allow an extra day for deemed acceptance. Accordingly, deemed acceptance would not take place until the end of the second day. If the payment order came in on the first day and there were sufficient funds in the account to meet it, under her Government's proposal acceptance would take place when the debit was made. There would then be a difference in the timing of the acceptance.

49. Mr. BHALA (United States of America) strongly opposed the Finnish proposal, which would nullify the Commission's decision to allow an extra day for deemed acceptance.

50. Ms. KOSKELO (Observer for Finland) stressed that her proposal did not concern deemed acceptance. For the receiving bank to debit an account of a sender was a conscious step and should, in her view, constitute acceptance. It had nothing to do with the deemed acceptance situation, which related to the problem that arose when the receiving bank did nothing.

51. Mr. ERIKSSON (Observer for Sweden) supported the Finnish proposal and agreed that it concerned something quite different from deemed acceptance. If the receiving bank debited an account of the sender, its act showed that it was prepared to issue the payment order.

52. Mr. VASSEUR (Banking Federation of the European Community) said that article 6(2)(d) (in the original arrangement) implied that the bank had to take an initiative. With the progress of computer technology, banking operations now took place immediately. He therefore proposed that the text of that provision should read: "when it executes the payment order received".

53. The CHAIRMAN said that he understood that point. However, in discussing the definition of the term "execution", the Commission had agreed (A/CN.9/SR.444, para. 26) that, if in its consideration of article 6(2)(d) it became apparent that the definition was unnecessary, it might be deleted. That appeared to be the case. He would therefore take it that the Commission approved the text of article 6(2)(d) reproduced in the annex to document A/CN.9/347 and that it deleted the definition of the term "execution" in article 2(1).

54. It was so decided.

The meeting rose at 5.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD (PARTIAL)* OF THE 453rd MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 19 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 6 (continued)

Article 7

* No summary record was prepared for the rest of the meeting.

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The discussion covered in the summary record began at 9.45 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 6 (continued)

1. The CHAIRMAN, having invited the Commission to consider paragraph 3 of article 6, said that the Canadian proposal that the word "sender's" in the first line be deleted did not seem to have met with any opposition and could be acted upon by the Drafting Group.

2. The observer for Sweden had suggested that the words "at the earliest possible time" be inserted before the word "unless" in the third line. However, difficulties of interpretation might arise because of the provisions of article 10(1), and he did not think that that suggestion was acceptable to the Commission.

3. The phrase "otherwise than by virtue of subparagraph 2(a)" was designed to solve the circularity problem. The concern expressed by the United Kingdom Government in its comments on article 6(3) (A/CN.9/347, p. 57) might have been somewhat alleviated by the changes made to article 10(1).

4. Mr. GREGORY (United Kingdom) said that the question whether notice of rejection had to be given when funds had not been received was still outstanding.

5. Mr. NEWMAN (United States of America) said he disagreed with the decision of the Working Group (A/CN.9/346, p. 45, para. 19) that a receiving bank was required to give notice of rejection if funds were not received, on the grounds that it was impracticable, for if the arrival of funds were merely delayed, the order could be executed with a later value date. Imposition of the rejection requirement could cause problems with payment orders from less developed countries, owing to differences in time zones. However, the Commission might wish to specify an end date after which payment orders would be deemed rejected or not accepted.

6. Mr. ABASCAL ZAMORA (Mexico) said that the Working Group had taken the view that the obligation to issue a rejection notice existed even if no funds had been received. There was an unresolved problem of sanctions in the event of a failure to give such notice. The earlier suggestion that a bank that failed to issue a rejection notice might be required to pay some seven days' interest had encountered strong opposition.

7. The Commission could either leave the paragraph as it stood, amend it to provide for the imposition of a sanction or delete it altogether.

8. Mr. GREGORY (United Kingdom) said that both a policy question and a drafting question were involved. As to policy, he felt that it was desirable to have such a requirement. The Model Law contained a number of provisions

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that might still be of some value despite the absence of related sanctions. Once the policy decision had been taken, the matter could be left to the Drafting Group.

9. Mr. NEWMAN (United States of America) said that, as he understood it, article 6(3), taken in conjunction with article 6(2)(a), indicated that a bank was not obliged to issue a rejection notice if funds had not been received. If that were not the case, a bank receiving a payment order without funds would have to check on the following day and, if the funds had still not arrived, would have to reject the payment order and wait for a new one, an absurd situation.

10. Under the circumstances, he proposed that the text should be amended to make it clear that no notice of rejection was needed if the receiving bank had not received the necessary funds.

11. The CHAIRMAN said that there were two conflicting interpretations: that a notice of rejection was required when no funds had been received - the view taken by the Working Group - and that no notice was required under those circumstances. That point had to be clarified.

12. Mr. BURMAN (United States of America) said that it was necessary to clarify a relatively fundamental policy issue. There seemed to be an anti-bank attitude among some delegations and a tendency to pile more and more responsibilities on to the banks. The Model Law was intended, however, not so much to regulate bank operations as to promote trade.

13. Banks did not usually issue notices when funds were not received and since the customers in question were commercial customers, they could be expected to know the state of their bank accounts. The extra expenditure of time and money by banks that would be required if they had to issue rejection notices under those circumstances was not justified. It would only slow down commercial flows.

14. Mr. DE BOER (Netherlands) said that, if no funds had been received, there was no deemed acceptance. For some reason or other, the Working Group seemed to wish to introduce an obligation without a corresponding sanction. He endorsed the remarks of the United States representative.

15. Mr. CRAWFORD (Canada) said he supported the deletion of the provision regarding notice of rejection in the absence of funds on grounds similar to those advanced by the United States delegation. If that were done, however, there was a second minor amendment that should also be made. In article 4A of the United States Uniform Commercial Code, which also stipulated that no notice of rejection was required if no funds were received, there was a provision that "stale" payment orders, which had not been executed, should be cleared out after five days. A similar provision would be useful in the Model Law, since keeping payment orders pending indefinitely might lead to confusion and error.

16. Ms. KOSKELO (Observer for Finland) said that the arguments in favour of requiring a notice of rejection even if no funds had been received were not very strong and deletion of the provision was quite acceptable. She agreed, however, with the representative of Canada as to the need for a supplementary provision regarding "stale" payment orders.

17. Mr. ABASCAL ZAMORA (Mexico) said that the requirement seemed to conflict with banking practice and would probably have scant effect. Moreover, a receiving bank could incur significant costs in issuing rejection notices without any guarantee that the sums could be recovered. He agreed, therefore, with the delegations of the United States and Canada that there were no valid reasons for the obligation and supported the Canadian proposal that limits of validity for payment orders should be stipulated.

18. Mr. LIM (Singapore) said that he agreed with the United States delegation that the requirement placed an undue burden on the receiving bank. That would not be of great importance if no sanction were imposed, and the principle of exclusivity (article 16(8)) were maintained. However, if the provision under article 16(8) were removed and the duty to give notice of rejection were maintained in the Model Law, failure on the part of a receiving bank to comply with article 6(3) might give rise to a breach of statutory duty and lead to an action in tort. He thought that no obligation should be introduced without a corresponding sanction, whether the exclusivity rule was retained or not.

19. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the United States proposal whereby the text of article 6(3) would be amended to make it clear that no notice of rejection was needed if the funds had not been received.

20. It was so decided.

21. The CHAIRMAN invited the Commission to consider the question of the length of validity of a payment order. He suggested a period of seven to ten days.

22. Mr. CRAWFORD (Canada) said that the period in the United States Uniform Commercial Code was five days.

23. Mr. LE GUEN (France) said that it would be better not to set a specific number of days but rather to state that the parties could agree that the validity of a payment order would be limited in time.

24. Mr. GREGORY (United Kingdom) said that a problem would arise if there were no contractual relationship between the sending and receiving banks. The Model Law should thus prescribe a specific time limit of so many days.

25. Mr. HERZBERG (Observer for Israel) pointed out that, if a day were taken to mean a business day, five days would be the equivalent of one week.

26. Mr. ERIKSSON (Observer for Sweden) said he agreed that it was necessary to provide a fixed number of days, as suggested by the representative of the

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United Kingdom. There should also be provision, however, for freedom of contract between the parties.

27. The CHAIRMAN said that article 4A of the Uniform Commercial Code set the limit at the fifth business day for funds transfers. He asked the representatives of Canada, the Netherlands, the United Kingdom and the United States to prepare a draft text on the subject.

28. U NYI NYI THAN (Observer for Myanmar) said he agreed with the representative of France. It was necessary to allow flexibility in time limits to accommodate the conditions in developing countries.

29. Mr. KAKOLECKI (Observer for Poland) said he supported the United Kingdom's view, since failure to fix the number of days would give rise to uncertainty regarding how long a bank should allow a payment order to remain open. He himself preferred a time-limit of five days. He also favoured the addition of the phrase "unless otherwise agreed", since it would accommodate the concern expressed by the representative of France.

30. Mr. EFFROS (International Monetary Fund) said that consideration should be given to the fact that, in practice, the relationship between sender and receiving bank might consist of a series of transactions. If funds were not available, a number of payment orders might accumulate during the viable period. It might, therefore, be necessary to provide a rule to determine the order of priority for payment of those orders when funds became available, whether FIFO, LIFO or some other such method.

31. The CHAIRMAN said that the question had been discussed in the Working Group and elsewhere, but there had been a general agreement to let it drop. Normally the FIFO (first in, first out) rule would apply. If that was the general understanding, there was no need to discuss it in the Commission.

32. Mr. ABASCAL ZAMORA (Mexico) said he agreed with the representative of the United Kingdom that there was a need to place a time-limit on the validity of a payment order. However, the Model Law should also take account of the concerns expressed by the representative of France, which also had some justification. He was, in any case, not entirely clear why it was necessary to protect the senders of payment orders without funds.

33. Mr. HERZBERG (Observer for Israel) said there should be no time-limit in article 6(3). The matter of the order of the allocation of funds, as they became available, to a series of payment orders was extremely complex and varied from country to country. It should therefore be left to domestic law.

34. Mr. LIM (Singapore) said that the concerns of the representative of France and the observer for Myanmar might best be accommodated if the approach proposed by the representative of the United Kingdom were reversed. Thus the time-limit for validity of payment orders would normally be determined by national law or contractual arrangements. If, however, there were no such provisions, the Model Law would prescribe a time-limit of five days.

35. Mr. DE BOER (Netherlands) wondered what would happen when the five-day period expired and whether the payment order would then be cancelled by operation of the Law. It would be interesting to know what was provided in article 4A of the Uniform Commercial Code.

36. The CHAIRMAN said that, once the time-limit had been reached, the payment order became invalid.

37. Mr. LE GUEN (France) said there were two categories of payment order. In the first case, the payment order was sent through a funds transfer system, which, in the context of its own rules, would establish a limit on the validity of the payment order. That situation would therefore be governed by the law of contract, so there was no need to include a rule in the Model Law. In the second case, a payment order would be sent direct to a bank. Most banks applied their own rules. Consequently, even if there were no prior contractual relationship, the sender, by choosing a particular bank, would accept a priori the conditions of that bank. Again the law of contract applied.

38. He therefore saw no need to establish a time-limit in the Model Law. Nevertheless, he would be able to accept the proposal of the representative of Singapore.

39. With regard to the order of payment of payment orders, there were long-established procedures arising from the law of cheques and there was no need to address that question in the context of the Model Law.

40. Mr. HUANG Yangxin (China) pointed out that the Model Law applied to all forms of credit transfer. While a time-limit of five days might be sufficient in the case of electronic funds transfers, it would be insufficient in the case of paper-based transactions. It was necessary to allow for the needs of developed and developing countries alike. The time-limit should thus be left to individual countries to determine.

41. Mr. ABASCAL ZAMORA (Mexico) said he supported the proposal by the representative of Singapore. He wondered whether the phrase "as otherwise agreed" could be used, as it was used elsewhere in the text of the Law.

42. The CHAIRMAN asked the representative of Singapore to prepare a suitable text for consideration by the Commission.

43. Mr. NEWMAN (United States of America) suggested that the ad hoc drafting group should replace the words "sufficient to cover the amount" in article 6(2)(a) by "sufficient for payment of the amount". The reason was that the word "cover" was used a number of times with different meanings in the Model Law.

44. The CHAIRMAN recalled that the Commission had still to decide on the opening phrase of article 5. As the delegation of the United States had made a concession in accepting the concept of "deemed acceptance", the Commission might, perhaps, agree that article 5 should apply to the Model Law as a whole. To those delegations which wished to restrict the application of

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article 5 to articles 6 and 8, he put it that, in practice, those were the articles mainly affected. He therefore suggested that article 5 should begin "For the purposes of this model law".

45. Mr. GREGORY (United Kingdom) said that the Commission needed to explore the conflict between articles 5 and 17, as raised by the observer for Finland and addressed by the representative of Canada.

46. The CHAIRMAN said he agreed that article 17(2) might cause problems, but his feeling was that the Commission was following the path of confining the Law to credit transfers, in which case it might well decide to eliminate article 17(2) altogether. The Commission might thus adopt the introductory phrase to article 5, on the understanding that the question could be reopened if the decision in respect of article 17 so required.

47. Mr. ABASCAL ZAMORA (Mexico) said that the relationship with article 17 should not be left unresolved. He personally saw no contradiction between the two articles. Article 5 referred to the moment when the sender paid. Article 17(2) established when the beneficiary bank accepted the payment order at the end of the transfer. That was quite different.

48. Ms. KOSKELO (Observer for Finland) said that, in he view, there was a conflict between article 5(b)(ii) and article 17 in terms of reimbursement. She would explain her reasoning at a later stage.

49. The CHAIRMAN said he took it that the Commission wished to accept the phrase "For the purposes of this model law" at the beginning of article 5, subject to the condition he had already explained.

50. It was so decided.

51. The CHAIRMAN recalled that it had been agreed to add the following subparagraph to article 6(2): "When the receiving bank makes a debit to an account of the sender with the receiving bank in order to cover the payment order." He was pleased to inform the Commission that agreement had been reached to accommodate the suggestion made by the observer for Finland the previous day by replacing the words "in order to cover" by the words "as payment for", thus avoiding the word "cover".

52. If there were no comments, he would take it that the Commission wished to adopt that modification.

53. It was so decided.

Article 7

54. The CHAIRMAN drew the Commission's attention to the United States Government's proposal (A/CN.9/347/Add.1, p. 15) that the word "appropriate" in the third line of article 7(2) should be deleted. If he heard no objections, he would take it that the Commission wished to adopt that amendment.

55. It was so decided.

56. The CHAIRMAN drew attention to the proposal by the Government of France (A/CN.9/347/Add.1, p. 3) that the following sentence should be added to paragraph 2: "It must, specifically, effect the operation in the currency or unit of account stipulated by the sender." As indicated in the accompanying explanation, the purpose of the addition was to remind receiving banks that they should not take the initiative of converting funds received into another currency.

57. Mr. LE GUEN (France) said that the purpose of the amendment was to remind banks that, when they received a payment order in a specific currency, they must not convert the funds in question into local or any other currency. Although paragraph 2 as currently drafted stated that a bank must issue a payment order that was consistent with the contents of the payment order received, currency conversion was one of the most persistent problems relating to international credit transfers for banks in France.

58. Mr. NEWMAN (United States of America) said that article 7 was concerned with payments by the receiving bank either to an intermediary or to a beneficiary bank. Every effort had hitherto been made to avoid the question of currency conversion and he regretted that it had suddenly been brought up.

59. Regarding the French proposal, he did not see how a bank in France which received a payment order in foreign currency could send that foreign currency to the next bank in the chain, since he knew of no local multi-currency payment or fund transfer system there. In most cases, therefore, there would be conversion, but that would concern the beneficiary bank, which was not yet under discussion. In his opinion paragraph 2 was satisfactory and needed no addition.

60. Mr. LE GUEN (France) said that the object was to ensure that a bank receiving a payment order in a currency other than that of its own country would issue an order to the beneficiary's bank in the currency in which the order was received. The practice in France was that banks receiving a payment order in, say, United States dollars would normally arrange to issue a payment order in dollars. A bank which had no correspondent with dollar accounts simply refused the operation and left it to a better equipped bank. There were fund transfer systems in Europe, such as the French Sagittarius system, which were designed to transmit payment orders in a number of currencies.

61. Mr. VASSEUR (Banking Federation of the European Community) said that the French proposal should be viewed in the light of a case that had come before the courts in Paris. In December 1984, the Société Générale had given an order to a bank to transfer the sum of 2 million French francs to its branch in the United States of America. The order was to have been executed in French francs, but the United States correspondent bank of the Société Générale had converted the sum into United States dollars, without any instructions to do so. In January 1985, the dollar had been worth 10 French francs but the operation had been delayed and, in the interim, the dollar had fallen. That was the kind of situation the amendment was designed to remedy.

62. Mr. KOMAROV (Union of Soviet Socialist Republics) said that he preferred paragraph 2 as it stood. The wording took into account the problems of France since the word "appropriate" presupposed that the bank should take account of all aspects of the credit transfer and execute it in an appropriate manner. If the sentence proposed by the representative of France were added, it might be necessary to explain why the bank could or could not execute the credit transfer. Moreover, the problem of exchange rates would arise, which the Commission had decided not to deal with.

63. Mr. SOLIMAN (Egypt) said he supported the French proposal because it dealt with a practical problem that was extremely important for the developing countries.

64. The CHAIRMAN asked the United States delegation, in connection with the case cited by the representative of the Banking Federation of the European Community whether it was possible under United States law to make a payment in French francs and maintain a currency account in the United States of America.

65. Mr. NEWMAN (United States of America) replied that, in 1984, it had been illegal for a United States citizen to maintain a foreign currency account in the United States. The law had not been changed until 1990 and, while there might be one or two banks in the United States that offered currency accounts, they were far from usual. What had been done in the case of the Société Générale was normal banking practice in the United States.

66. The fundamental problem, however, was that it was the originator and the beneficiary that had to determine the flow of funds. In the case in question, the French bank had not realised what it was doing, because it should have known that the beneficiary did not maintain a French franc account in the United States of America.

67. Generally speaking, conversion to the local currency was appropriate, because that was the only way in which most banks could pay. If it were not deemed appropriate, it would be for the originator to make the fact known, and for the beneficiary to say where he wanted his funds. The operation should be pre-arranged and not flow in with fast payment order processing.

68. Mr. LE GUEN (France) said he wished to remind the members of the Commission that they were discussing the receiving bank. His proposal had nothing to do with the beneficiary bank, which was dealt with in article 9.

69. He agreed with the United States representative that, in the case mentioned by the representative of the Banking Federation of the European Community, the French bank had been in error in asking for a payment in French francs in the United States of America. The responsibility lay, however, with the beneficiary and not the intermediary bank. His delegation's proposal meant that a beneficiary bank which became involved in such a procedure should bear the consequences. The Model Law should not place the responsibility for ill-considered decisions on the intermediary banks.

70. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that a sender's purpose in stating that payment was to be effected in a specific currency was to guard against paying exchange commission, to avoid variations in exchange

(Mr. Safarian Nematabadi, Islamic Republic of Iran)

rates, etc. He understood and supported the French proposal, especially as regards payment orders made to intermediary banks.

71. Mr. NEWMAN (United States of America) explained that a bank did not always know if it was acting in the capacity of an intermediary or a beneficiary bank. When it processed a payment order it simply processed a payment order. The word "consistent" in article 7(2) should, in his view, cover the purpose of the French proposal.

72. In some places, conversion into the local currency was effected automatically and it would give rise to a great deal of extra work if intermediary banks were obliged to process transactions in currencies in which they did not usually deal. Orders of that sort needed to be set up in advance.

73. A bank could receive a payment order such as that referred to by the representative of France in one or other of two ways. Either the bank's French franc account would be credited or it would be instructed to debit the sender's dollar account. If it was then instructed to transfer the amount to another United States bank with which it had no French franc relationship, it could either convert French francs into dollars or see if the sender had a relationship of any sort with the beneficiary. The second option would involve the bank in a great deal of time and effort.

74. Mr. BHALA (United States of America) said that, in addition to the practical difficulties involved and the burden laid on the banks by certain demands, it was necessary to take into account the position of central banks. Even if its role were restricted to that of an intermediary bank, the Federal Reserve Bank, for example, would not be in a position to carry out the type of conversion required by the French proposal. The accounts it held for its customers were all in dollars. When a payment had to be made in a different currency, that was a matter for the originator and the beneficiary to work out.

75. Mr. GREGORY (United Kingdom) said that foreign exchange was an extremely sensitive issue and had to be handled carefully. He thought it implicit from the way in which the Model Law had been drafted that it was addressing the question of international credit transfers in a single currency. Although the principle of the French proposal was perfectly correct in so far as the basis of the Law was concerned, it would present difficulties if it was stated explicitly. He considered it preferable to leave article 7(2) as it stood.

76. Mr. NEWMAN (United States of America), replying to a question by the CHAIRMAN, said that, unless a United States bank had made prior arrangements with another bank, all payment orders in foreign currencies were automatically converted to dollars in his bank and in nearly every bank that he knew in the United States. United States banks were not in the foreign currency payment business. They used dollars. Multi-currency accounts had been introduced into the United States in 1990 only and, as far as he knew, only two banks were offering that service.

(Mr. Newman, United States of America)

77. Replying to another question by the CHAIRMAN, he said that, if his bank had a French franc account and if it received a payment order to credit it with French francs, it would of course do so.

78. The CHAIRMAN said that, in such a case, its action would be "consistent with the contents of the payment order", referred to in article 7(2).

79. Mr. BHALA (United States of America) said that the problems involved in the United States were more than merely operational and practical. Serious and sensitive central banking issues were involved in the matter. When payment orders came into United States banks, the Federal Reserve Bank might be involved and, if the credit were to be effected in foreign currency, the Federal Reserve Bank would be concerned about the extension of credit in foreign currency and also about the monetary policy of the country whose currency it was.

80. Mr. LE GUEN (France) said that the discussion was very enlightening on the differences between banking systems. Multi-currency arrangements were already quite common in Europe. The trend was growing and a common European currency might soon be in existence in Europe, parallel to existing national currencies. It seemed to him desirable that the Model Law should take such forthcoming developments into account.

81. He quite understood the concern of central banks, which were never particularly happy to see their national currencies circulating in foreign countries. That was not, however, the point at issue. The purpose of his delegation's proposal was to allow multi-currency payment systems to function where they existed. If a bank did not have the facilities to effect payment in a foreign currency, it could always refuse a payment order and other arrangements could be made. Where such arrangements did exist, however, as they did in Europe, the Model Law should not serve as a brake on them.

82. The arguments used against the proposal seemed contradictory. It was difficult to argue that the purpose of the proposal was already covered by article 7(2) and also that its implementation would place an extra burden on banks.

83. Mr. CRAWFORD (Canada) said that the Model Law should be aimed at establishing a sustainable position that was both practical and fair. The current difficulty appeared to be due to rivalry between currencies that, in some spheres, might be competing for the dominant role. All the Commission could do for the moment was to try to draft a Model Law dealing objectively with the basic needs of banks in dealing with international credit transfers.

84. The two words, "consistent" and "appropriate" in article 7(2) seemed to him to provide ample scope for interpretation and for the development of banking relations. All in all, the article gave banks flexibility of operation and encouragement to cooperate with other banks and he supported it.

85. The CHAIRMAN said that, while there was considerable sympathy for the French views and the reasoning behind them, the Commission considered it advisable to refrain from mentioning foreign-exchange matters in the

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Model Law. It was unable, therefore, to accept the French proposal, but agreed that any failure to comply with an order for payment to be effected in a specific currency or unit of account would constitute a breach of the payment order under article 7(2) and, more particularly, of the words "consistent" and "appropriate" therein.

86. Mr. LE GUEN (France) said that he would bow to the will of the majority. He could not help wondering, however, which countries' problems the Model Law was intended to solve.

87. Mr. BURMAN (United States of America) said that the Model Law was, of course, intended to solve the general problems of as many countries as possible. While he was fully aware of the problems encountered by France, and the problem under discussion had been expressed in terms of payment order issues between French sending banks and United States receiving banks, the whole question of trading and providing credit in foreign currencies was of concern to the central banks of most countries.

88. Mr. ABASCAL ZAMORA (Mexico) said he hoped that the absence of agreement on the problem under discussion would not jeopardize the Model Law. He also hoped that the Commission would not view the issue as finally settled, but would be ready to consider any formulation submitted during the days to come in an endeavour to meet the concerns of the delegations of both the United States and France.

The meeting rose at 12.35 p.m.

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Twenty-fourth session

SUMMARY RECORD OF THE 454th MEETING

Held at the Vienna International Centre, Vienna,
on Wednesday, 19 June 1991, at 2.30 p.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 7 (continued)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 2.40 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 7 (continued)

1. Ms. KOSKELO (Observer for Finland) drew attention to her Government's proposal for article 7(2) (A/CN.9/347, p. 21). Her delegation contended that the problem of adequate cover for the payment order was not solved by article 4(6). It took the view that late execution of a payment order might not be the only cause of delay to a payment order once a bank had accepted it. Failing to take the necessary steps to provide funds for the next receiving bank to implement the order was equally important. A receiving bank which had accepted a payment order had a duty to execute it, first by issuing and implementing the order, and then by taking steps to provide funds for its acceptance by the next receiving bank. Subparagraph (b) of the text proposed by her Government contained the word "cover", but she would not insist on it being used; a formulation such as "other steps necessary to implement the payment order" might be preferable.

2. Mr. DE BOER (Netherlands) supported the Finnish proposal. The idea it embodied had been accepted in principle by the Working Group and was in accord with the proposal of his own Government for article 16 (A/CN.9/347, p. 45). It was immaterial to him whether the idea was incorporated into article 7(2) or article 16.

3. Mr. BHALA (United States of America) opposed the Finnish proposal. As worded, article 4(6) of the Model Law contained an obligation to pay. Article 5 contained a clear definition as to when payment was to be made. What was proposed was a fundamental addition that would replace an obligation to pay by an obligation to have paid. Such an obligation would lead on to the thorny issue of what constituted cover. A basic objection to it was that it would impinge on the credit decisions of the banks involved. At present, an implementing payment order followed on the original payment order throughout the chain from originator to beneficiary; whether the intermediary bank accepted the payment order of the sending bank without funds was a credit decision to be left to that intermediary bank. To require the intermediary bank to have funds or the sending bank to send funds would affect their freedom of decision, with which the Model Law should not interfere. The consequences of such interference would be temporary or permanent impediment to the processing of many payment orders and obviously deleterious effects on high-speed credit transfers.

4. Finally, underlying the proposal was the assumption that the credit transfer system worked by matching payment orders with covering payments. That was not the case; it was simply not practical for every one of, say, 18,000 payment orders a day to be matched with funds to see whether it was acceptable.

5. Mr. BURMAN (United States of America) endorsed the arguments of the previous speaker. Reasonable though the provision proposed by Finland might seem, it would conflict with existing international banking practice and would seriously interfere with a variety of transmission methods used by intermediary banks, particularly those in third world countries that did not have access at certain points of the transaction to alternative funding sources.

6. Mr. ERIKSSON (Observer for Sweden) agreed with the delegation of Finland on the need for a rule on cover for payment orders.

7. Mr. GREGORY (United Kingdom) said that he was not at all sure that he agreed with the analysis made by the United States delegation of the consequences of the Finnish proposal. The United States delegation had given two particular reasons why the provision proposed by Finland would be incompatible with current practice. The first was that it would interfere with intermediary banks' credit decisions; he was not certain that would be the case. A sender had a duty to pay, and that did not affect the decision of the receiver as to whether to accept a payment order before obtaining payment. The credit decision seemed to him to be one which the receiver had to take, and his decision to accept and provide payment without waiting for payment himself seemed to be separate from the question whether his sender should send him payment.

8. The second point made by the United States delegation was the procedural problem of matching funds with payment orders. That did not seem to him to flow from the Finnish proposal, which recognized the existence of netting systems and other ways in which payment might be made, but said nothing of making individual payments to cover individual payment orders; all it required was that the bank which accepted the payment order must take appropriate steps to provide cover for its implementing payment order.

9. He agreed with the representative of the Netherlands that the issue was one which the Working Group had felt needed to be addressed in some way. It was closely related to article 4(6) and he thought that the matter was covered by the United Kingdom's written proposal to insert a reference to article 4(6) in article 16 (A/CN.9/347, p. 63, para. 29), so that a bank late in paying would incur an interest penalty. He put it forward as an alternative to the Finnish proposal.

10. Ms. KRAG JORGENSEN (Denmark) said that she had found the United Kingdom explanation very helpful. Her delegation nevertheless preferred the Finnish alternative.

11. Mr. CRAWFORD (Canada) said that in his view the matter was one of drafting rather than of principle. He believed that some sort of provision for cover should exist in the draft. In his opinion, article 7(2) was reasonably clear as it stood. If a close look was taken at its final clause, it could be construed as providing everything needed to meet the requirements of the Finnish delegation. A sending bank was already under a duty to provide cover.

12. Mr. HUANG Yangxin (China) agreed with the representative of the United Kingdom on the close link between the Finnish proposal and article 4(6). The crux of the matter lay in the point at which a receiving bank which sent out a payment order itself became a sender, and the need to determine at what point it should provide cover. Did the obligation to provide funds arise when the payment order was issued or after it had been accepted? The logical step, if the Finnish proposal was accepted, would be to bring article 4(6) into line with article 7(2).

13. Mr. ABASCAL ZAMORA (Mexico) recalled that the Working Group on International Payments had analysed at length the obligation of a receiving bank on receiving a payment order and had agreed on the present text on the understanding that the key word was "appropriate", unclear though that word might be. The Commission would do better to leave the text as it stood than to repeat the discussion which had taken place in the Working Group.

14. Mr. AZZIMAN (Morocco) said that in his view the two obligations, that of issuing a payment order and that of covering a payment order, were assumed by a bank as two separate but complementary obligations. To that extent he supported the position of the delegation of Finland.

15. As to the practical difficulties which, in the view of the United States delegation, would result from acceptance of the Finnish proposal, particularly in third world countries, he did not think they would arise if the provision was couched in general terms; problems would occur only if it included a great deal of practical detail. His suggestion for the provision on cover would be on the following lines: "the receiving bank is required to take the necessary action to ensure coverage of a payment order". That would avoid the imposition of any constraints on the bank.

16. Mr. NEWMAN (United States of America) said that the interests of ensuring consistency in the Model Law were best served by adhering to the existing text.

17. Mr. SKELEMANI (Observer for Botswana) said that there was no dispute as to the principle. In his view, the paragraph as drafted highlighted what was essential. If that was not the general view, he could agree to the paragraph being amended in accordance with the proposal by Finland.

18. Mr. GREGORY (United Kingdom) said that the obligation to provide cover existed under article 4(6). He reiterated his view that the question of delay in providing it might be addressed in the context of article 16.

19. Ms. KOSKELO (Observer for Finland) said that the following was an example of the problem her delegation was trying to solve: if a sending bank which had received a payment order executed it on day one by sending its own payment order to the next bank, but failed to make the funds available for the payment until day five, the next bank might not accept the order until day five; that would mean a delay of four days in dealing with the transaction. As the draft was presently worded, however, the sending bank's duty to pay arose only upon acceptance of the payment order by the next bank in the chain. Her Government's proposal did not affect the methods of payment which banks used between themselves; those arrangements depended on the relationship between

(Ms. Koskelo, Observer for Finland)

the banks concerned. She could not accept the Canadian view that the matter was catered for by the last clause of the existing wording of article 7(2).

20. Mr. HUANG Yangxin (China) said that the possibility for the Model Law to create the problem referred to by the observer for Finland would persist unless article 4(6) was modified.

21. Mr. GRIFFITH (Observer for Australia) said that his delegation recommended approval of the existing text. Otherwise, it would be difficult for the Commission to make further progress without defining the notion of "cover".

22. Mr. ABASCAL ZAMORA (Mexico) said that the obligation incumbent on the receiving bank to pay was implicit in the terms of article 7(2).

23. Mr. IWAHARA (Japan) agreed with the previous speaker and approved the existing text.

24. Mr. BURMAN (United States of America) said that in his view the problem was solved satisfactorily by reference to article 4(6).

25. The CHAIRMAN said it seemed to him that the discussion indicated a majority acceptance of the approach suggested by the United Kingdom for dealing with the problem raised by the observer for Finland.

26. He invited the Commission to take up paragraph 3 of article 7. It had before it two proposals for that paragraph: one by the United Kingdom to remove the implication that the receiving bank had a duty to detect misdirection (A/CN.9/347, p. 58, sect. 10) and the other by Finland to delete the paragraph (A/CN.9/347, p. 22).

27. Mr. BHALA (United States of America) supported the Finnish proposal.

28. The CHAIRMAN said that, unless he heard an objection, he would take it that the Commission adopted the Finnish proposal to delete article 7(3).

29. It was so decided.

30. The CHAIRMAN invited the Commission to consider article 7(4). In its written comments (A/CN.9/347, p. 58, para. 11), the United Kingdom had expressed the view that paragraph 4 was useful but too widely drawn, and had put forward an alternative text.

31. Mr. BHALA (United States of America) suggested that discussion was needed before the Commission could reach a conclusion on the notification duties set out in paragraphs 4 and 5 of article 7. Due account must be taken of the time which a bank needed to determine in what way a payment order was insufficient and then to fulfil its duty of notification.

32. Mr. NEWMAN (United States of America) explained that in the inquiries department of United States banks most problems connected with transfers of funds could be processed quickly, but he knew of no bank where they could be processed on execution day. His own bank could do so within 24 hours if it did not have to contact a third party, but the largest bank in the United States had a three-day standard for performance. He therefore suggested that at least one further day should be allowed for notification under article 7(4).

33. Mr. CRAWFORD (Canada) wondered whether the notion of detection should not also be embodied in paragraph 4.

34. The CHAIRMAN said that the words "the receiving bank shall give notice to the sender of the insufficiency" in article 7(4) might create implicit liability, the breach of which would be subject to damages. If that was not the intention, the text should be improved.

35. Mr. BHALA (United States of America) said that he had difficulty with the words "appears to be intended" in the United Kingdom proposal. He was concerned with the possibility of a wrongdoer sending instructions to a receiving bank that appeared to be intended as a payment order, so that he could subsequently hold the receiving bank liable for failure to notify him under article 7.

36. Mr. GREGORY (United Kingdom) said that the text proposed by his Government might be made more explicit by stating: "when a bank detects that an instruction appears to be intended". That would deal with the point raised by the Canadian representative. As to the possibility of fraud mentioned by the United States representative, under article 16(3), interest was payable only on funds that had been received for the period during which the bank retained the payment. It would be an extraordinarily speculative act for a wrongdoer to send money to a bank in the hope that it would fail to do something. On the basis that where there were no funds there would be no penalty, the Commission could safely accept the provision.

37. Mr. BHALA (United States of America) remarked that in his experience such a fraud was not as unlikely as the United Kingdom representative had suggested.

38. Mr. FELSENFELD (United States of America) said that the Commission seemed to consider that if a penalty was reduced the bank had less of a responsibility to carry out the law quite so assiduously. However, in the United States at least, the very strict bank regulations simply did not allow banks to take their legal obligations less seriously because the relevant penalty was lower. Any provision in the Model Law that placed a responsibility on a bank must be taken seriously, since bank regulators would see that it was enforced.

39. Mr. KAKOLEWICKI (Observer for Poland) endorsed the views expressed by the United States delegation. In practice, the obligation laid down in article 7(4) would be difficult to carry out without an extra day being allowed for the purpose.

40. Mr. ADEDIRAN (Nigeria) supported the United Kingdom proposal.

41. The CHAIRMAN said that he took it that the Commission agreed that an extra day should be allowed for compliance with the obligation contained in paragraph 4 of article 7; and that the United Kingdom's written proposal, amended along the lines suggested at the present meeting by its representative, should form the basis of the paragraph.

42. It was so agreed.

43. The CHAIRMAN invited the Commission to consider article 7(5). Many delegations had made proposals for dealing with the problem which that provision addressed, namely an inconsistency in a payment order between the words and figures describing the amount of money to be remitted. The Commission must therefore decide whether words or figures should prevail.

44. Mr. ABASCAL ZAMORA (Mexico) said that where an order was transmitted electronically, it was difficult to detect mistakes because figures alone were used. Inconsistencies became evident in a documented payment order given by the originator to his bank. The Working Group had considered that an adequate solution would be for a bank which had doubts about the amount of the order to conduct an investigation if it so wished, a position which took account of current banking practice. The last sentence of the paragraph left open the possibility for agreement on the subject between the parties.

45. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) thought that the inconsistency referred to in the paragraph could be regarded as a lack of the necessary information. His delegation favoured the existing wording.

46. Mr. AL-NASSER (Observer for Saudi Arabia) said that, having consulted banking circles in his country, his delegation had been informed that it was sufficient, in the event of an inconsistency, to rely upon words. Furthermore, if a transfer operation was halted in order to contact the bank concerned for verification, that would have an adverse effect on the main advantage of electronic transfers, i.e. their speed. It was clear that electronic transfer systems would continue to develop and that traditional transfer operations would diminish in number.

47. Mr. LIM (Singapore) drew attention to the Secretariat's comment on the paragraph (A/CN.9/346, p. 14, para. 49, second sentence) to the effect that the Working Group had expected that paragraph 5 of article 7 would apply only between the originator and the originator's bank, in other words, only to paper-based transfers.

48. Ms. KOSKELO (Observer for Finland) said that the Commission should consider what would happen if, instead of conducting an investigation into an inconsistency in the payment order between the words and the figures, the bank executed the order. In order to avoid the problem which that would create, a simple solution would be to establish a rule stating that either words or figures would prevail.

49. Mr. NEWMAN (United States of America) suggested that the words "if there is an inconsistency" should be amended to read: "If the receiving bank has knowledge that there is an inconsistency". He made that suggestion because in any manual transaction it should be the responsibility of the receiving bank to detect the error and notify the sender.

50. After a discussion in which Mr. ABASCAL ZAMORA (Mexico), Mr. CRAWFORD (Canada), Mr. POTYKA (Austria) and Mr. NEWMAN (United States of America) took part, Mr. GREGORY (United Kingdom) said that the United States suggestion did not solve the problem raised by Finland.

51. Mr. LE GUEN (France) warned the Commission against establishing in article 7(5) a distinction between credit transfers made through an electronic funds transfer system and credit transfers effected manually. If the Commission introduced the notion of an electronic funds transfer system into the article, it would have to insert a definition of such a system in article 2. As a consequence, the entire intellectual process on which the Model Law was based would be brought into question. The matter had been discussed at length in the Working Group, which had not reached agreement on it, with the result that the present provision was a compromise. If that compromise was now upset, the balance of the Model Law might be disrupted completely.

52. The CHAIRMAN suggested that the problem might be solved if the element of detection was incorporated into the paragraph.

53. He noted from a show of hands that a fairly large majority of the Commission favoured the text of article 7(5) with the addition of wording incorporating that notion.

The meeting rose at 5.35 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 455th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 20 June 1991, at 9.30 a.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 7 (continued)

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Article 9

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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Distr.: 27 June 1991

The meeting was called to order at 9.40 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 7 (continued)

1. The CHAIRMAN said that, at the previous meeting, the Commission had completed its consideration of article 7(5).

2. Mr. BHALA (United States of America) said he thought that the Commission had been close to reaching a decision at the previous meeting on whether the Model Law should contain a clear rule stipulating that either words or figures should prevail when a payment order contained an inconsistency between the two. Some confusion on the part of his own delegation had, perhaps, prevented such a decision from being reached, and he asked if the debate might be reopened on article 7(5) and, possibly, on article 9(3) as well.

3. The CHAIRMAN, observing that discussion of article 7(5) might be linked with that of article 9(3) but not with that of article 9(4), invited comments on the United States request.

4. Mr. GREGORY (United Kingdom) said that, in response to the request made to him by the Chairman at the close of the previous meeting, he had prepared a wording for article 7(5). He had tried to meet the United States concern regarding the need to detect a discrepancy and its desire that a bank's failure to notice one and relying on the figures in a payment order would not be in breach of the law and the Finnish concern regarding the conflict arising between liability provisions if a bank did not give notice but executed an order.

5. Mr. CRAWFORD (Canada) said that the procedure followed at the previous meeting had been somewhat confusing. As he understood the situation, the ad hoc drafting group presided over by the United Kingdom representative had been invited to report back to the Commission. In addition, he saw no reason why the Commission should be precluded from reopening the debate on discrepancies between words and figures in payment orders when it came to consider article 9(3).

6. Mr. ABASCAL ZAMORA (Mexico) said that he had no objection to the United States request. The Commission had not reached a final decision at the previous meeting.

7. The CHAIRMAN recalled that the Commission had decided to retain the original text with modifications to be submitted by the United Kingdom representative.

8. He suggested that the Commission should decide not to reopen the debate on article 7(5) for the moment and not to discuss the same issue under article 9(3) or article 9(4) but to reconsider the matter later in its session.

9. It was so decided.

10. The CHAIRMAN invited the Commission to consider article 7(6). He drew attention to the changes proposed by the Governments of Finland and the United Kingdom in document A/CN.9/347 and by the Government of the United States of America in document A/CN.9/347/Add.1. He noted that the Government of Finland had proposed that the paragraph should be relocated to follow paragraph 2 and asked for comments on the United Kingdom's proposed new wording for the paragraph.

11. Mr. NEWMAN (United States of America) said that what he could only describe as an operational nightmare could occur if a receiving bank were allowed to change an intermediary bank. For example, if a bank instructed by the Bank of China to credit a certain amount to the Chase Manhattan Bank for a beneficiary paid that amount to Manufacturer's Hanover Trust Co. instead, the result would be that the account at Manufacturer's Hanover Trust Co. was long and the account at Chase Manhattan short, because the Bank of China had already made use of the funds. Thus no rule allowing for a change in intermediary bank without immediate notification or request for further instructions should be permitted.

12. Changing a funds transfer system was less serious, since the funds would eventually reach the bank for which they were intended. Regarding changes in the means of transmission, a bank should not be allowed to send funds by mail if instructed to send them by cable, although the reverse would be in order. A receiving bank must not, however, be allowed to disregard an instruction of the sender specifying an intermediary bank.

13. He was unable to support the United Kingdom proposal.

14. Mr. CONOBOY (United Kingdom) said he failed to understand the position of the United States delegation. He shared that delegation's concern that the original text of article 7(6) would allow a receiving bank to take a unilateral decision to change an intermediary bank, thus disregarding the sender's instructions, and his Government's proposed amended text was designed to prevent such a situation from occurring.

15. Mr. POTYKA (Observer for Austria) said that the United Kingdom amended text was very clear and reflected, he thought, the views of the majority.

16. Mr. IWAHARA (Japan) said he could see little difference between the standpoints of the United Kingdom and the United States delegations. Their intentions seemed to be the same and he found the United Kingdom text very clear.

17. Mr. CRAWFORD (Canada) said he supported the United Kingdom proposal which would prevent a receiving bank from changing an intermediary bank unless it had received fresh instructions from the sender. The proposal included a reference to "the time required by article 10" as did the existing text. He asked the Chairman if his ruling concerning the extra day should be carried through to all the other related paragraphs and, consequently, to article 7(6).

18. The CHAIRMAN said that the Commission had agreed to include a provision for an extra day in article 7(4) only. The question might, if necessary, be raised again at a later stage.

19. Mr. BHALA (United States of America) said that article 7(6) was concerned with changing the sender's instructions regarding an intermediary bank, the funds transfer system or the means of transmission. The United States problem concerned the changing of an intermediary bank. The original text of article 7(6) left a receiving bank free to disregard the sender's instructions regarding an intermediary bank to be used in a given transaction.

20. The reason why the United States delegation believed that a receiving bank could change the funds transfer system or the means of transmission but not an intermediary bank was the following: if a beneficiary's bank (or the beneficiary) relied upon the receipt of funds at a designated intermediary bank and, consequently, drew down on its account with the intermediary bank in reliance upon that expected receipt, an overdraft might be created and damages might result. A receiving bank should not therefore be allowed unilaterally to disregard instructions on the designation of an intermediary bank.

21. A receiving bank should not be prevented from changing a funds transfer system or a means of transmission, without seeking the sender's agreement, if that would assist it to carry out a credit transfer order, but it should in no circumstances be allowed to change an intermediary bank without seeking such agreement.

22. Mr. LE GUEN (France) said he could not understand the objections raised by the United States representative. The definitions indicated that an intermediary bank was a receiving bank other than the originator's bank or the beneficiary's bank.

23. Mr. BISCHOFF (Observer for Switzerland) said he supported the United Kingdom proposal, according to which the receiving bank could not unilaterally change a payment order but could merely ask the sender for further instructions. He was therefore at a loss to understand the United States objections to that proposal.

24. He was not sure whether the United Kingdom proposal referred to a payment order that had been accepted but could not be executed for routing reasons or to one that had not been accepted and could not be executed for the reasons mentioned in article 6.

25. Mr. CONOBOY (United Kingdom) said that it was implicit in his Government's proposal on article 7(6) that the payment order had already been accepted. The purpose of the reference to article 7(2) was to make it clear that, if the bank issued the notice within the prescribed time-limit, it would not be in breach of its obligation to execute appropriately following acceptance.

26. Mr. NEWMAN (United States of America) said that his delegation supported the existing text of article 7(6), apart from the reference to an intermediary bank. According to the United Kingdom proposal, a bank had to ask the sender

(Mr. Newman, United States of America)

for instructions to change a funds transfer system. That would be unwise, as it would result in loss of time. If a payment order specified notification by mail and it was known that mail would not arrive in time, the bank should be permitted to transmit by cable; that would not change the value passed on to the next bank in the chain. On the other hand, if there was to be a change in the intermediary bank, an inquiry should always be made if payment to the specified bank were impossible. However, that was not permissible under the existing text.

27. The CHAIRMAN pointed out that the United Kingdom proposal did not permit the receiving bank to change an intermediary bank unilaterally.

28. Mr. NEWMAN (United States of America) said that, while that was so, the United Kingdom proposal did not permit a change in the funds transfer system or the means of transmission either, and that was wrong. All that was needed was a provision that the intermediary bank could not be changed, which could be achieved quite simply by deleting the words "an intermediary bank" in paragraph 6.

29. Mr. CONOBOY (United Kingdom) said that, according to his Government's proposal, the receiving bank would not be allowed to change the intermediary bank unilaterally, for if it did so it would be in breach of article 7(2).

30. With regard to the funds transfer system and the means of transmission, there might be a point of substance in the United States view regarding the choice of the funds transfer system and means of transmission. However, in an international environment, the choice of a funds transfer system might entail routing through a particular country, whereas the sender might have good reason not to wish funds to be routed through that country. He would have to be reassured that such a situation was very unlikely before he could accept the United States view regarding the possibility that the receiving bank might change the funds transfer system.

31. Mr. ERIKSSON (Observer for Sweden) said that, if a bank wished to change the first intermediary bank, and the first intermediary bank, in its turn, wished to change the second intermediary bank, there would be two courses open to it. It could either change the second intermediary bank or, if it were not allowed to do so, it could reject the payment order. If it rejected the payment order, the same problem that was of concern to the United States delegation would seem to arise.

32. Mr. NEWMAN (United States of America) said that, in practice, if his bank was unable to pay the designated intermediary bank direct, because it did not have an account with that bank, another intermediary bank would be chosen which was a common correspondent to both the banks. That would not change the ultimate purpose of the payment order. If that course of action could not be taken, a payment order would not be rejected as such but new routing instructions would be requested, and that would be tantamount to rejection.

33. Mr. CRAWFORD (Canada) said that, while he understood the concern of the United States delegation, he did not agree with the proposed solution, for the mere deletion of three words would still leave a number of problems. It would not be possible to permit the Model Law to empower a receiving bank to choose a different funds transfer system.

34. The United States representative had said that it would always be possible to substitute a more rapid means of transmission but the current drafting would, in fact, permit a slower means. That was a problem that could not be resolved by a minor drafting change.

35. The United States delegation appeared adamant that no change of intermediary bank could be tolerated, but the arguments it had advanced in favour of that proposition seemed hardly convincing, for the beneficiary would have no interest in the selection of the intermediary bank.

36. All in all, he thought that the United Kingdom proposal might be improved by including the possibility of substituting a more expeditious means of transmission, with a provision for referral back to the sender.

37. Mr. NEWMAN (United States of America) said that he had been referring not to the beneficiary but to the beneficiary's bank. It was the normal practice for banks to draw funds before they were credited. If his bank credited a foreign bank in, say, China, the foreign bank would receive notice that a sum of money would be available on a particular day. It would then draw the money on the day in question but there might be no funds available in the particular intermediary bank if it had been possible to change the routing.

38. With regard to the means of transmission and the related question of delay, he pointed out that mailing would cause delay while telex would not.

39. Mr. HUANG Yangxin (China) said that the discussion seemed to be straying from the point. The problem could be very simply resolved by assuming that a bank making an inquiry was thereby giving notice of rejection.

40. All delegations were of the opinion that a receiving bank should not change a payment order unilaterally. If that order specified transmission by telegram or mail, the receiving bank had no right to change it. In accordance with the normal rules, if a particular bank did not have an account with a designated intermediary bank, it could use any bank, but that would not change the payment order and would not, in essence, change the intermediary bank designated in the payment order.

41. Mr. HERZBERG (Observer for Israel) said that it might be better to delete paragraph 6. According to the general rule of law, a bank had a duty to approach the sender and obtain instructions in cases of doubt. The matter could be left to the general rule of law.

42. Mr. NEWMAN (United States of America) said that the statement by the representative of China seemed to indicate that, if there were specific

(Mr. Newman, United States of America)

instructions to give advice by mail, it would rule out use of the SWIFT procedure. He doubted whether that was the intention of the Chinese delegation.

43. Mr. HUANG Yangxin (China) said that if the payment order specified dispatch by mail, such an order could be rejected but its terms could not be changed, as there might have been very good reasons for the instructions given.

44. Mr. ABASCAL ZAMORA (Mexico) said that it was generally agreed that a receiving bank should not unilaterally change the intermediary bank. As a possible compromise, he suggested that the reference in the United Kingdom's proposal to the means of transmission be deleted and replaced by wording taken from the first sentence of article 7(6) in the existing text of the Model Law.

45. If the receiving bank wished to change the means of transmission in order to achieve faster transmission, then it should not be required to request authority.

46. Mr. LIM (Singapore) said that a decision should be reached whether or not the receiving bank was to be allowed to make a unilateral change in the designated funds transfer system and means of transmission. While there seemed to be general agreement that a bank should not be allowed to change the intermediary bank without a prior inquiry, there seemed to be no good reason why it should not change the funds transfer system or means of transmission if the payment order were executed on time.

47. He agreed with the representative of Canada that it would not be sufficient merely to delete three words from the existing text of article 7(6). The article should explicitly state what criteria were to be applicable to unilateral action. For example, if the instructions stated that a payment order should be transmitted by post and there was a postal strike, the receiving bank should be allowed to transmit it by a more expeditious means.

48. Mr. BHALA (United States of America) said he completely agreed with the representative of Singapore. The Commission should proceed on the lines that representative had suggested.

49. Mr. CONOBOY (United Kingdom) said that the concerns of many delegations might be met by simply deleting the words "means of transmission" from the text proposed by his Government. There would be no liability under the Model Law for a bank that speeded up transfers; however, if a bank unilaterally chose a slower means of transmission that resulted in delays, it would do so at its own risk and article 16 would apply.

50. Mr. KAKOLECKI (Observer for Poland) said that he had sympathy for the views expressed by the representatives of Singapore, the United States and the United Kingdom. One problem that still remained was that of the general rule which specified that a payment order should be executed exactly according to

(Mr. Kakolecki, Observer for Poland)

instructions. However, the Model Law should, perhaps, specify that it was permissible for a bank to choose a more expeditious way of transmitting payment orders.

51. Mr. VASSEUR (Banking Federation of the European Community) said that he could not agree that the receiving bank should be able unilaterally to change a prescribed means of transmission by substituting a more rapid means. In a major French bank, transmission by post was the rule in about one quarter of the cases. As the representative of China had rightly said, if the originator had given instructions for transmission by post, he had good reasons to do so. It was not permissible, therefore, for a bank to choose a more expeditious means of transmission without consulting the sender. As a general rule, the instructions given should be obeyed.

52. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the text of article 7(6) proposed by the Government of the United Kingdom (A/CN.9/347, p. 59), with the revision made orally by the United Kingdom representative.

53. It was so decided.

54. The CHAIRMAN invited the Commission to consider article 7(7).

55. Article 7(7) was approved.

Article 8

56. The CHAIRMAN invited the Commission consider article 8. He suggested that paragraph 1(a) of the article should be redrafted to bring it into line with article 6. The square brackets around "execution" would be deleted.

57. A decision regarding the square brackets in paragraph 2 would be taken when a satisfactory definition of "execution date" had been agreed upon.

58. Mr. ERIKSSON (Observer for Sweden) said that the reference to "a court" in subparagraph (g) was too narrow. He suggested the addition of "or another competent legal authority".

59. Secondly, subparagraph (g) gave the impression that banks were always permitted to apply the credit to a debt of the beneficiary, although under many legal systems that was not allowed except by agreement with the beneficiary or by court order. He suggested that the reference be deleted. Alternatively, the words "if it is allowed" could be inserted after "when the bank" in order to clarify that it could be done only with the agreement of the beneficiary or in accordance with the applicable law.

60. Mr. GREGORY (United Kingdom) said that subparagraph (g) made no comment on the entitlement of a bank to apply the credit to a debt of the

(Mr. Gregory, United Kingdom)

beneficiary. It merely stated that the fact of so doing constituted acceptance. The question of entitlement would be decided by the applicable law.

61. Mr. KAKOLECKI (Observer for Poland) said he was in favour of adding the reference to a "competent authority", since there were authorities other than courts in his country capable of deciding such matters.

62. He agreed with the United Kingdom representative's comments on the entitlement of a bank to apply the credit to a debt. The assumption underlying the Model Law must be that banks would act in accordance with the applicable law, so there was no need to state it explicitly.

63. Mr. ABASCAL ZAMORA (Mexico) said that article 9(1) clearly accommodated the concern of the observer of Sweden by stating that, upon acceptance of a payment order received, the beneficiary's bank was obligated to place the funds at the disposal of the beneficiary.

64. Mr. ADEDIRAN (Nigeria) said that, if the list of earliest times when a payment order was accepted by the beneficiary's bank was intended to be exhaustive, the object could be achieved by deleting subparagraphs (d), (e) and (g), and deleting the words "as instructed in the payment order" from subparagraph (f).

65. Mr. KOMAROV (Union of Soviet Socialist Republics) said he was able to accept article 8(1) as it stood because it established the minimum legal basis for acceptance or rejection of a payment order. He agreed with the United Kingdom representative that there was no need in the case of subparagraph (g) to state expressly that the application of a credit to a debt was subject to the agreement of the beneficiary or the applicable law.

66. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to approve the existing text of subparagraphs (d), (e), (f) and (g) of article 8(1), on the understanding that the Drafting Group would expand the term "court" in subparagraph (g) to include the idea of "any competent authority".

67. It was so decided.

Article 9

68. The CHAIRMAN suggested that the Commission, when considering article 9, might wish to adopt the same approach that it had used when dealing with article 7.

69. Mr. BHALA (United States of America) said that his delegation had been given to understand, at an earlier stage in the meeting, that the subject of discrepancies between words and figures could be discussed under article 9(3).

70. The CHAIRMAN said that the Commission had decided to postpone discussion of that problem until later in its session, specifically mentioning that it would not be discussed under article 9(3) or 9(4).

71. After a procedural discussion in which Mr. BHALA (United States of America), Mr. NEWMAN (United States of America) and Mr. CRAWFORD (Canada) took part, the CHAIRMAN said that, while the Commission could hardly go back on such a recent decision, the issue in question might be tackled if time permitted.

72. Mr. POTYKA (Observer for Austria) recalled that his delegation had raised another problem under article 8 which, it had been told, could be discussed under article 9. There seemed to be an inconsistency between the two articles, in that article 9(1) stated that the beneficiary's bank was obligated, upon acceptance of a payment order, to place the funds at the disposal of the beneficiary although, under the conditions set forth in article 8(1)(d), (e), (f) and (g), it might not be able to do so.

73. The CHAIRMAN said that the rules in article 8(1)(d), (e), (f) and (g) had nothing to do with execution. As he understood it, the problem of the Austrian observer was covered implicitly by the last part of article 9(1). The issues dealt with under articles 8 and 9 were quite distinct and the Commission, like the Working Group, had decided that article 9(1) was concerned with the relationship between the beneficiary and the beneficiary's bank, which was outside the scope of the Model Law.

74. Mr. ABASCAL ZAMORA (Mexico) said that a bank had to accept a payment order in accordance with article 8(1) and execute it in accordance with article 9. There should be no contradiction. While the concepts of acceptance and execution were legally different, the fact that a bank expressed its willingness to accept when it executed an order meant that, in practice, execution was the same as acceptance.

75. Ms. KOSKELO (Observer for Finland) said that the Austrian observer's problem was probably a drafting one, stemming from the wording of article 9(1), which referred only to the placing of funds at the disposal of the beneficiary. That wording was, in fact, too narrow because it gave the impression that the beneficiary's bank must always place the funds at the disposal of the beneficiary, despite the provisions of article 8(1)(d), (e), (f) and (g). She suggested that the difficulty might be resolved if the words "or otherwise apply the credit" were inserted after the word "beneficiary" in the second line of article 9(1).

76. The CHAIRMAN said that, in his opinion, the words "place the funds at the disposal of the beneficiary" covered the situation referred to by the observer for Finland. It was a very broad reading but, since article 9(1) referred to the payment order and the applicable law, its purport was clear. All those issues were left to the applicable law.

77. Mr. LOJENDIO OSBORNE (Spain) said that article 9(1) should be left as it stood. The problem referred to by the observers for Austria and Finland could be resolved by an appropriate reference in article 16(6).

78. Mr. POTYKA (Observer for Austria) explained that he had raised the issue because of certain problems under Austrian law. He would not press it, however, since it seemed that other countries did not have the same problem.

79. Mr. CRAWFORD (Canada) said that he still had some lingering doubts concerning the breadth of the interpretation of the words "placing funds at the disposal of the beneficiary" in article 9(1). The same words were used in article 8(1)(d) and were rapidly acquiring an accepted meaning in the context of the Model Law. Unless the suggestion by the observer for Finland were accepted, there was a risk of conflict between article 9(1) and article 8(1)(f), in view of the content of article 8(1)(d).

80. The CHAIRMAN said that article 8 should have no implications for article 9(1), which was concerned with the applicable law and not the Model Law. The representative of Canada seemed to be confusing the two.

81. Mr. ADEDIRAN (Nigeria) said that he, too, found an apparent contradiction between article 8 and article 9(1). He supported the suggestion made by the observer for Finland.

82. The CHAIRMAN said that the intention of the Working Group had been that the funds should be placed at the disposal of the beneficiary in accordance with the payment order, all other issues being subject to the applicable law. It was essential that acceptance and execution be kept separate.

83. Mr. GREGORY (United Kingdom) said he shared the unease of the representative of Canada. If the problem was really a drafting one, he could see no harm in the Finnish suggestion which the representative of Nigeria had supported.

84. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed that the issue was a drafting one with no substantive implications and that the suggestion by the observer for Finland should be submitted to the Drafting Group.

85. It was so decided.

The meeting rose at 12.30 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 456th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 20 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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International payments: draft Model Law on International Credit Transfers (continued)

Article 9 (continued)

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Article 10 (continued)

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The meeting was called to order at 2.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 9 (continued)

1. The CHAIRMAN invited the Commission to consider article 9(5). He said that in its written comments (A/CN.9/347, p. 60, sect. 19) the United Kingdom had proposed that the words "unless the payment order states otherwise" should be added at the beginning of the paragraph.

2. Mr. BHALA (United States of America) said that he opposed the proposal. He suggested the deletion of the paragraph, on the ground that, in the case which it envisaged, the beneficiary's bank would either pay the beneficiary by cheque or notify him that the funds had been deposited. It was up to the originator to inform the beneficiary that funds had been deposited with the beneficiary's bank. The Model Law should not attempt to regulate the relationship between the beneficiary and the beneficiary's bank, yet article 9(5) imposed an obligation on the beneficiary's bank in the situation in which the beneficiary did not even have an account with that bank. From a practical point of view, it should be remembered that some banks received up to 3,000 payment orders falling into that category each day.

3. Mr. GREGORY (United Kingdom) said that it would be desirable to make provision for cases in which there was no existing relationship between the bank and the beneficiary.

4. Mr. SCHNEIDER (Germany) said that, if paragraph 5 was deleted, the effect would be to require the sender to inform the beneficiary about the transaction. His delegation favoured the retention of the paragraph.

5. Mr. IWAHARA (Japan) said that it would be better to keep the paragraph and to amend it in accordance with the United Kingdom proposal.

6. Mr. CRAWFORD (Canada) said that his primary concern was the lack of time available to the beneficiary's bank for execution of a payment order. It ought to be permissible for the beneficiary's bank to transmit a cheque to the beneficiary by post.

7. Mr. GREGORY (United Kingdom) said that he would favour the idea of allowing the beneficiary's bank a longer period for giving notice.

8. Mr. POTYKA (Observer for Austria) suggested that the word "give" should be replaced by the word "send".

9. The CHAIRMAN remarked that the aim of article 9 was to establish a kind of "gentleman's agreement" rather than a criterion for compensation for non-performance within a given time.

10. Mr. GREGORY (United Kingdom) said that article 16(6) provided for the liability of the beneficiary's bank for non-performance under article 9. With that in mind, he saw merit in the Austrian suggestion. However, problems might arise if the expression "send notice" was used in one part of the Model Law and the expression "gives notice" in another.

11. Mr. BERGSTEN (Secretary of the Commission) said that there were precedents in other UNCITRAL documents for using the word "send" in such a context.

12. Mr. ABASCAL ZAMORA (Mexico) said that the implication of the existing text was surely that the parties were bound until the moment of receipt. The point made by the representative of the United Kingdom was important. If the Austrian proposal was nevertheless accepted, that should be done on the understanding that the same solution might not apply in the case of rejection of a payment order.

13. Mr. GREGORY (United Kingdom) said that the solution proposed might be valid for article 9(5), but prove unacceptable in articles 6 and 8, which would require further discussion.

14. Mr. NEWMAN (United States of America) said that the intention of the Model Law should not be to change banking practice. The obligation incumbent on the beneficiary's bank to make the funds available was implicit in the text, but it was for the beneficiary's bank to determine the way in which that obligation was fulfilled.

15. Mr. BURMAN (United States of America) suggested that the word "shall" should be replaced by the words "should if feasible".

16. Mr. KOMAROV (Union of Soviet Socialist Republics) said that it was his understanding that, if a bank received a payment order and the beneficiary had no account with that bank, the latter should be free either to execute the order itself or to find another bank with which the beneficiary did have an account. In that case the transaction would be governed by article 7.

17. Mr. GREGORY (United Kingdom) said that, as he understood it, the duty arising from paragraph 5 of article 9 was similar, although not identical, to that imposed by paragraph 1 of the article. It was not a recommendation but a rule of law.

18. Mr. ABASCAL ZAMORA (Mexico) expressed concern at the contradiction inherent in imposing an obligation on the beneficiary's bank in the text while at the same time saying that the obligation existing between the beneficiary's bank and the beneficiary was regulated by law. If it did that, the Commission would be interfering in the law regulating the relationship between the beneficiary and his bank, which would conflict with its previous decisions.

19. Mr. ADEDIRAN (Nigeria) considered that in practice the situation which the Commission was discussing was non-existent, since if a beneficiary was

(Mr. Adediran, Nigeria)

expecting a payment he would contact the sender to find out where it had been sent. It would be dangerous to impose the obligation in article 9(5) on a bank that had no relationship with the beneficiary.

20. The CHAIRMAN noted from a show of hands that a majority of the Commission approved the existing text of article 9(5) with the addition of the words "unless the payment order states otherwise" at the beginning of the paragraph, as proposed by the United Kingdom. He also noted that the Commission agreed that the question of the liability of the beneficiary's bank should be discussed in connection with article 16.

21. He invited the Commission to take up article 9(4). He said that the position of the United States and the Banking Federation of the European Community, as set out in their respective written comments (A/CN.9/347/Add.1, p. 16; A/CN.9/347, p. 68), was that the account number should prevail in cases of a discrepancy between words and figures. The Working Group had taken a different view and its text was before the Commission. In addition, the United Kingdom had proposed the deletion of the reference to the originator's bank (A/CN.9/347, p. 60, sect. 18). He asked whether there was any support for the idea that the account number should prevail in cases of uncertainty.

22. He noted from a show of hands that there was no support for that idea and that the Commission preferred the existing text with the amendment proposed by the United Kingdom.

23. Mr. DE BOER (Netherlands) said that in his view it was impossible to lay down a general rule on discrepancies between words and figures, since the situation differed according to whether the payment order was electronic or paper-based. Indeed the Model Law did not contain such a rule: the only rule it did provide on the subject was that, when a discrepancy was detected, notice must be given. If the discrepancy was not detected, in his view article 4(5) would operate.

24. Mr. NEWMAN (United States of America) explained that the Society for Worldwide Interbank Financial Telecommunications (SWIFT) system was used by some 85 States, including most of the members of the Commission. Within the SWIFT standard system there were fields identified by both name and number. When automated receiving banks received SWIFT payment instructions, most of them would examine only numbers. Since they would not halt each transaction in order to compare name and number, their procedure was not compatible with the present wording of paragraph 4 of article 9 as to identification of the intended beneficiary. Banks in countries belonging to the SWIFT system would be unable to comply with the rule set out in that paragraph.

25. The CHAIRMAN observed that a clear majority of the Commission had indicated its support for the existing text of paragraph 4 with the change proposed by the United Kingdom.

26. Mr. GREGORY (United Kingdom) said that, at a previous meeting (A/CN.9/SR.454, para. 53), the Commission had indicated its wish for the existing text of article 7(5) to incorporate the notion of detection. He would therefore propose a text for that provision which met the Commission's requirement and also - since a number of the issues raised by article 9(4) were similar to those raised by article 7(5) - a corresponding text for article 9(4).

27. The CHAIRMAN suggested that the Commission should revert to article 9(4) when the United Kingdom text was available.

Article 7 (continued)

28. The CHAIRMAN recalled that at a previous meeting the Commission had decided (A/CN.9/SR.454, para. 42) that one extra day should be provided for notification under article 7(4). He asked whether it wished to allow the receiving bank an extra day for compliance with its obligations under paragraphs 5 and 6 of article 7.

29. After a short discussion in which Mr. GREGORY (United Kingdom) and Mr. NEWMAN (United States of America) took part, the CHAIRMAN said he took it that an extra day should be provided for notification under article 7(5).

30. It was so agreed.

31. The CHAIRMAN said that it also seemed the wish of the Commission to allow the beneficiary's bank an extra day for compliance with its obligation under article 9(2).

Article 10 (continued)

32. The CHAIRMAN said that the following text had been proposed by the United States delegation for paragraphs 2 and 3 of article 10:

> "(2) A notice required to be given under article 7(4) or (5) shall be given as soon as possible but not later than the business day after the day the payment order is required to be executed.
>
> "(3) A notice required to be given under article 9(2), (3) or (4) shall be given as soon as possible but not later than the business day after the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary."

The proposals seemed to be of a drafting nature, in view of the fact that the Commission had agreed to extend by one day the periods referred to in article 10(4) and (5) and article 9(2) and (3). It had also decided to do away with the words "payment date" in article 10(3). That might make it possible to combine paragraphs 2 and 3 of article 10.

(The Chairman)

33. With regard to the United States proposal for article 10(3), the words "when the funds are to be placed at the disposal of the beneficiary" might be replaced by the words "if required to be executed", because the Commission had expanded the notion of execution to embrace execution by the beneficiary's bank.

34. Mr. LE GUEN (France) said that the text proposed by the United States for paragraph 2 of article 10 referred to the business day after the day on which the payment order was required to be executed. However, he wondered how it was possible to speak only of a payment order in that paragraph, since the Commission was setting a deadline for compliance with article 7(4), which dealt in addition with an instruction which was not a payment order. He would like to know how such an instruction could give rise to a requirement of notice. Likewise, the United States proposal for article 10(3) referred to article 9(2), which also dealt with an instruction that was not a payment order. It was not possible for instructions that were not payment orders in articles 7(4) and 9(2) suddenly to become payment orders in article 10(2) and (3). But the problem might be only one of drafting.

35. He found that the procedure of setting different deadlines for different purposes was becoming complex and might not be very practical for the staff of a medium-sized bank. It might be preferable to have a single deadline such as the one laid down in article 10(1); that would be clearer and help to improve the operation of international trade and financial systems.

36. Mr. CONOBOY (United Kingdom) said that his delegation would prefer the phrase "as soon as reasonable" to the words "as soon as possible". The word "possible" could give rise to different interpretations.

37. Mr. BHALA (United States of America) agreed with the French representative that the question of the term "payment order" was a matter of drafting. With regard to the question of deadlines, he agreed on the need for clarity in the text but stressed that they were important because they involved duties of notification which gave rise to liability if they were not met. His delegation could accept the replacement of the word "possible" by the word "reasonable".

38. Mr. CRAWFORD (Canada) recalled that the expression "commercially reasonable" had caused problems when it had been discussed in connection with article 4(3). A possible alternative would be the word "promptly".

39. Mr. BURMAN (United States of America) concurred. He reiterated his delegation's view that the exact phraseology of the provision should be left to the Drafting Group.

40. Mr. LE GUEN (France) disagreed, pointing out that the Commission had not expressed a unanimous opinion on the matter.

41. The CHAIRMAN feared that the inclusion in paragraphs 2 and 3 of article 10 of a qualifying phrase of the kind under discussion could lead to disputes involving claims for breach of contract and damages.

42. Unless he heard any objection, he would take it that the Commission referred the United States proposal for paragraphs 2 and 3 of article 10 to the Drafting Group on the understanding that they would not contain the qualifying phrase "as soon as possible" but would allow an extra day for notice to be given without any element of delay.

43. It was so decided.

44. Mr. BISCHOFF (Observer for Switzerland) said that whatever wording was finally decided on for article 10(2), it should refer to paragraph 6 as well as paragraphs 4 and 5 of article 7.

45. The CHAIRMAN replied that the Commission had decided that an extra day should be allowed for notification under paragraphs 4 and 5 of article 7 but not for action under paragraph 6.

46. Ms. KOSKELO (Observer for Finland) said that one point on article 10(3) might not have been resolved, namely that of the date to which it referred. In many cases, a payment order would not contain a payment date; her preference would be to see the date referred to as an "execution date".

47. Mr. ABASCAL ZAMORA (Mexico) asked for clarification of the relationship between article 10 and the Commission's decision not to allow an extra day for action under article 7(6).

48. The CHAIRMAN repeated that in the discussion on paragraphs 4 and 5 of article 7 the Commission had agreed to provide for an extra day for notification. The decision in regard to article 7(6) had been that no such extra time was required.

49. Mr. LIM (Singapore) pointed out that article 7(6) continued to refer to article 10. He wondered if that was a drafting error.

50. The CHAIRMAN said that was a matter for the Drafting Group.

51. Mr. CONOBOY (United Kingdom) said that the United States proposal for article 10(2) referred to notice being given not later than the business day after the day when the payment order was required to be executed. However, reference back to the decision which the Commission had taken on article 10(1), which dealt with the business day on which the payment order was required to be executed, showed that not one but two days were mentioned, namely the day on which the payment order was received and the following day.

52. The Commission should decide, before referring the paragraph to the Drafting Group, whether the time-limit for notification should be based on the day on which payment was received or the following day. He would like to know whether the extra days contemplated in the United States proposal were cumulative.

53. The CHAIRMAN said that he had assumed that the extra day proposed by the United States was additional to what was provided for under the rule in article 10(1). The reasoning behind that was that the extra day was not intended for normal business but was time required for investigation purposes. He asked the Commission to agree that the wording could be entrusted to the Drafting Group on that basis.

54. It was so decided.

55. The CHAIRMAN invited the Commission to take up article 10(5). He drew attention to the proposal submitted by Canada (A/CN.9/347, p. 10, para. XXXVIII).

56. Mr. BHALA (United States of America) objected that the phrase "ordinary course of business" proposed by Canada was not precise enough. His delegation felt that more than a mere drafting matter was at issue in the Canadian proposal and accordingly it could not support it.

57. The CHAIRMAN noted the absence of outright support for the Canadian proposal. He would therefore take it that the Commission approved the existing text.

58. It was so decided.

59. The CHAIRMAN invited the Commission to take up article 10(6).

60. Mr. SCHNEIDER (Germany) said that he had some difficulty in accepting the paragraph as it stood. He questioned whether it would always be practical to treat branches and separate offices of a bank in different States as separate banks. He cited the example of a group which provided electronic or bank-wide payment systems and had a central office in another State than its head office as well as branch offices in that same State; with the originator's branch and the beneficiary's branch in that same State, payment orders would pass between the branches without there being, in the legal sense, a contractual relationship between them. A bank in that system would be in a position to retain monies for some time without redress. He suggested that the question of regarding separate offices as banks was more complicated than at first appeared.

61. The CHAIRMAN said that his advice from the Secretariat was that branches were mentioned in the Model Law on the assumption that they would conduct transfers independently. If the representative of Germany was linking the branch to the main office and regarding the two as conducting one operation, his position seemed to be very different from that of the Working Group.

62. Mr. SCHNEIDER (Germany) said that he would be satisfied with a mention in the Commission's report that the relationship between a branch and its main office was not a contractual relationship nor deemed to be such.

63. Mr. CRAWFORD (Canada) asked whether in that case the text itself should remain as it was.

64. Mr. NEWMAN (United States of America) said that if the representative of Germany sought it to be placed on record that branches of the same bank were not separate banks, that clashed fundamentally with paragraph 6. In the example which the representative of Germany had given of two branches and a main office, whether connected electronically or not, they were still the same bank in the same State and the originating bank which was one branch would pass a payment order to the head office to pay another branch. The question was whether they were three separate banks or not. If the answer was yes, paragraph 6 should remain as it was; if not, paragraph 6 needed amendment.

65. The CHAIRMAN said that Germany's difficulty appeared to be with the general law of contract, but that had nothing to do with the Model Law. He hoped that an accommodation could be found between the views of the representative of Germany and those delegations which could accept the paragraph as it stood.

The meeting rose at 5.05 p.m.